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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

FRIENDS OF DALE CREEK ROAD, Plaintiff and Appellant, v. CELESTE COLE et al., Defendants and Respondents.	C083416 (Super. Ct. No. SCCVCV1101112)

This appeal follows a court trial concerning the law of implied common law dedication. Plaintiff Friends of Dale Creek Road, an unincorporated nonprofit association, sued dozens of private property owners (collectively defendants) for quiet title, declaratory judgment, and mandatory and prohibitory injunctions, with the primary goal of establishing the implied common law dedication of a roadway commonly referred

to as Dale Creek Road (the road).[1] In its statement of decision, the trial court made various findings, the most important of which was that there was insufficient evidence of public use of the road to establish implied common law dedication.

On appeal, plaintiff attacks many of the trial court's findings in the statement of decision and challenges several of the trial court's evidentiary rulings. We address only two of plaintiff's arguments. First, we conclude plaintiff failed to show the alleged evidentiary errors were prejudicial. Second, we conclude plaintiff failed to show the trial court abused its discretion in finding insufficient evidence of public use of the road to establish an implied common law dedication. Because the affirmed finding of insufficient public use of the road strikes a death knell at the heart of plaintiff's implied dedication claim, we do not consider the remainder of plaintiff's arguments. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts and findings are taken from the statement of decision.

The road is located in the southern portion of Siskiyou County. It "begins at Old Stage Road, and passes through the Hammond Ranch subdivision, then through land currently owned by Defendant Michigan-California Timber Company LP . . . , through [United States] Forest Service [(Forest Service)] land, then private land known as the Hammond Parcel, and finally through more Forest Service land until its terminus at Dobkins Lake." "The Hammond Ranch subdivision was created in 1968 from land once owned by the Hammond family and used for cattle ranching. Hammond Ranch was a 'collage of different properties' . . . ."

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[1] William Grossen and Aaron Grossen were also plaintiffs in this action, asserting a single cause of action for quiet title as the fourth cause of action in the complaint. That cause of action was severed and is not the subject of the court trial leading to this appeal. The fourth cause of action was later dismissed.

At least some portion of the road was constructed in the 1940's by a logging company. "At some point the road acquired a Forest Service road number, No. 41N26. There was no indication as to when that occurred, or the significance of such a designation. The Forest Service has denied having an easement on this road." The trial court stated: "This court cannot and does not conclude that this designation creates a right to public access, nor does the mere existence of a Dale Creek Road on older maps create such a right."

"The court heard testimony from 29 users of [the road]. Of these, 17 could establish use commencing at least 5 years prior to March 4, 1972. Use in the 1940's was testified to by 5 witnesses (Tom Jackson, James Gubeta, Gerald Spini, Robert Cervelli, Charles Chitwood); in the 1950's by an additional 5 witnesses (Edward Day, Ernest Bowen, Richard Zanetti, Harold Meadows, Steven Roger Blankenship); with the remainder establishing their first use in the 1960's (Pat Campbell, John Dohrn, Steve Freeman, Karol Goudelock, David Climent, James Haines, Tony Spada).

"These witnesses used the road for various recreational purposes, including fishing, camping, hiking, hunting, and occasionally snowmobiling. Frequency of use ranged from less than once a year (James Haines), to 10-20 times a year (James Gubeta). Nearly all of the witnesses testified that they believed the road was a public road and that they used it as such. On the other hand, at least three had implied or express permission: Edward Day, whose family worked for the Hammonds, Tom Jackson and Steven Blankenship. Two witnesses (Richard Zanetti and Robert Cervelli) testified that they knew the road (or at least part of it) was private, yet used the road anyway.

"None of the witnesses testified that there was any governmental maintenance, improvement or interest in [the road]. There was no evidence that any governmental agency expended any money on [the road]. The [F]orest [S]ervice land through which [the road] travels has now been designated by the U.S. Forest Service as a non-motorized

'roadless' area, precluding access by motorized vehicles on the road through [Forest Service] property.

"The public continued to use [the road] after March 1972, with usage increasing annually. When houses were built on the Hammond Ranch subdivision, the new owners attempted to block access to what they believed was a private road. Fences were erected, signs were installed, and boulders and berms placed to prevent the public's use. Although the testimony was conflicting, it appears that these efforts began with placing signs, most likely in 1968 or later, and the placing of gates sometime between 1990 and 1995. Portions of the property were posted 'no hunting' as early as 1960 following the 'great doe hunt.' "

The trial court discussed two implied common law dedication cases decided by our Supreme Court -- *Gion v. City of Santa Cruz* (consolidated with *Dietz v. King*) (1970) 2 Cal.3d 29 and *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201. The court also discussed the facts and analysis of two appellate opinions: (1) *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, upholding a finding of implied common law dedication; and (2) *County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, upholding a finding of no implied common law dedication.

The trial court made five specific findings. First, the court said it could not find implied common law dedication over the entire length of the road. "Plaintiff in its closing brief asks this Court to grant a year-round public easement over [the road] from Old Stage Road all the way to Dobkins Lake. This Court cannot do so. [The road] passes through two sections of land owned by the U.S. Forest Service (before and after the 40[-]acre Hammond Parcel). Plaintiff did not name or serve the Forest Service, and this court has no jurisdiction to declare an easement on its property. [¶] In addition, there is insufficient evidence to show implied dedication of [the road] across the 40[-]acre Hammond Parcel." The court explained the owner of the Hammond parcel erected signs, barricades, and gates that were torn down and put back up. "There was

[also] credible testimony that there was not a defined road across the 40[-]acre Hammond parcel at the time of purchase. According to the owner Dean Hammond, people would use the creek bed as a road, and this testimony was confirmed by others. The route taken depended on the creek's watercourse. In order to establish implied dedication in a road, it must be a defined road, and this court finds that the section of [the road] through the Hammond parcel does not meet this definition. Note also that the Hammond Parcel is bordered north and south by Forest Service property. Given that this court cannot declare dedication over that property because the Forest Service is not a party, it cannot grant an easement to land that can only be accessed through Forest Service property."

Second, the trial court said it could not find implied common law dedication of the road for year-round use, horseback riding, or use of four-wheelers. The court explained there was insufficient testimony regarding use of the road in the wintertime and, although there "was some evidence that witnesses had observed horse trailers on one or more occasions, . . . only one witness (Gerald Spini) testified that he ever rode horses on [the road] or that he drove a horse trailer on [the road]." "Likewise, there was no evidence that anyone ever used four wheelers (aka quad runners, ATV's, 4x4's) at any time prior to March 4, 1972."

Third, the trial court said it could not find implied common law dedication of the road for what it called road hunting. The court explained: "There is no support, legally or factually from the record, for finding that the public has a right to hunt on private property. There was no claim to such a right asserted in the Fourth Amended Complaint. Thus, any 'road hunting' would be precluded as to all except the Forest Service land. And since as previously stated the court cannot issue an order affecting Forest Service land, the court cannot make a finding of any dedication for road hunting on any portion of [the road]."

Fourth, the trial court said it could not find implied common law dedication of the road for parking. The court explained: "What is clear from th[e] testimony is that there

was no specific place where users parked. There is likewise no clear evidence as to who owned the property on which vehicles parked." The court found the evidence insufficient "to have put the owner of the property on notice that his property was being used in this manner" and further explained that "[t]he only roadside parking supported by the evidence was for purposes of 'road hunting', previously discussed."

Finally, the trial court said there was insufficient evidence of public use of the road to establish implied common law dedication. The court explained that, in the absence of evidence the private property owners knew the public used the road, it "must look to the overall level of use to determine if there is sufficient indirect evidence that the owner had the requisite notice to establish dedication." The court wrote: "In this case, the testimony was inconsistent as to the level of use. What is clear is that the usage depended on the season. Fishing season began May 1, but most witnesses testified that the road didn't become usable until the latter part of June. Hunting season (third weekend in September to third or fourth weekend in October) saw the greatest use, and the road became impassable after that until the next spring/summer.

"One of the most credible witnesses, whose memory seemed unaffected by time, was Thomas Jackson. He would go on [the road] once or twice a year to fish at Dobkins Lake or hunt at Dale Meadows. Until 1972[,] he would see one or two other people or vehicles, sometimes no one. He described the area as undeveloped and isolated until the houses in the subdivision were built (after 1968). This testimony is consistent with that of other witnesses -- that about 50% of the time they would see others, that the number of others would be around 1-2, and that the number was considerably higher in hunting season. There were witnesses who testified to a larger number of other people, but even those witnesses agreed that at least 50% of the time there was no one else to be seen.

"Virtually all of the witnesses testified that the reason they liked Dobkins Lake and the surrounding area was because it was undeveloped and isolated. No witness ever

testified that the owner was aware of his use. (One witness, Richard Zanetti, when asked if he ever asked for permission, testified that there was 'no one there to ask.')

"In analyzing whether this is sufficient use to establish dedication, the court also looks to the testimony of the defendants who were asserting the defense of bona fide purchaser. It was undisputed that use of [the road] increased significantly after 1972. Yet even with this increased use, the defendants who observed [the road] saw few or no users. Tom Waring first went on [the road] on early 1991, inspected the property and road about 15-20 times, and never saw anyone on the road. Barbara Fuhrer was on her property about 3-4 times a year between 1988 and 1990, and saw a few people using the road. One was using her driveway. Two vehicles were camping on her property and left when she demanded they do so. Other purchase[r]s included Cami McAmis, Pat Butler, David Stroshine, Paul Elberts, John Brennan, Kristen Stroud, Terrence McGraw and Kurt Melander. They testified consistently that they inspected their respective properties, which border [the road], and saw nothing to indicate that the public was using the road or that the public believed they had the right to do so. The court finds the testimony of these witnesses credible.

"Defendants' expert witness, Dustin Lindler, was offered as an expert to analyze past use of [the road]. He stated that he can look at a road and determine intensity of prior use. Intensive use will predispose the road to washing away of fines. He found no evidence of such intensive use on [the road], stating that [the road] would not look the way it does now if it had significant historical use. (He was not specific as to the exact number of vehicles per day would [*sic*] constitute significant use.)

"The 'high standard of usage' required to put the owner on notice that the property was in danger of being dedicated simply has not been met here. The court therefore finds that Plaintiff has failed to meet his [*sic*] burden of proof, and that judgment must be entered in favor of Defendants."

DISCUSSION

Under common law, "prior to 1972 adverse public use of a road for more than five years generally gave rise to an implied dedication of a public easement to use the road." (*Burch v. Gombos* (2000) 82 Cal.App.4th 352, 361.) The central question in these cases is generally "whether the use shown to have been made of the [road] by the public is ' "such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner." ' " (*Friends of the Trails v. Blasius*, *supra*, 78 Cal.App.4th at p. 825.) Not every "instance of recurrent 'public' passage over private property [will] qualify as adverse use for purposes of implied dedication. The use must be substantial, diverse, and sufficient, considering all the circumstance, to convey to the owner notice that the public is using the passage as if it had a right so to do." (*Id*. at p. 825, fn. 7.)

Plaintiff argues the trial court erred in finding no implied common law dedication because there was sufficient evidence regarding the public's use of the road, the number of users, and the diversity of users to support its claim. Plaintiff further argues: (1) the use of the road followed a definite line of travel; (2) the trial court's rulings regarding the scope of the implied easement were erroneous; (3) no bonafide efforts were made by landowners to control public access prior to 1972; (4) bonafide purchaser for value is not a defense to an implied common law dedication; and (5) the trial court made several erroneous evidentiary rulings.

We conclude the trial court did not abuse its discretion in finding the public's use of the road insufficient to establish implied common law dedication and plaintiff has failed to articulate and show the alleged erroneous evidentiary rulings resulted in prejudice. We need not and do not consider plaintiff's remaining arguments because they are inconsequential to the outcome on appeal.

I

Plaintiff's Evidentiary Arguments Fail

Plaintiff raises three claims of evidentiary error. It asserts the trial court erred in: (1) precluding on hearsay grounds some of its witnesses from testifying "the basis for their belief (state of mind) that Dale Creek Road was a public road based upon information received from other family members and friends"; (2) admitting the "Angler's Guide to the Lakes and Streams of the Trinity Divide" "for the limited purpose of showing that defendants may not have been bona fide purchasers given this public document" instead of admitting the document for all purposes; and (3) allowing and relying on Lindler's expert testimony because it "was based upon pure speculation and conjecture" and "should not have been allowed or considered."

A party challenging an evidentiary ruling must affirmatively show error in the ruling and, more importantly, must show the ruling was prejudicial. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.) Plaintiff acknowledges it must show prejudice but makes no effort to argue prejudice resulted from the allegedly erroneous rulings except to state, "the trial court acknowledged the case was a 'close' call and not an easy decision to make." In an accompanying footnote, plaintiff notes, "[t]his was stated on the record at one of the post trial hearings and is not currently in the record." In that regard, plaintiff said it "will add it before the case is submitted." We have not received a supplemental record and plaintiff has failed to carry its burden of showing any potential prejudice arising from the allegedly erroneous evidentiary rulings. We therefore decline to consider the merits of plaintiff's arguments.

II

Plaintiff Fails To Prove The Trial Court Abused Its Discretion In Finding Insufficient Public Use Of The Road For Implied Dedication

A

Standard Of Review

Plaintiff argues the trial court's rulings on the merits are subject to substantial evidence review. Defendants believe the appropriate standard of review is abuse of discretion.[2]

We review the trial court's finding that plaintiff failed to prove implied common law dedication for abuse of discretion. (*Friends of the Trails v. Blasius, supra,* 78 Cal.App.4th at pp. 825-826.) The abuse of discretion standard contains a substantial evidence component. "We defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion. If there is no evidence to support the court's findings, then an abuse of discretion has occurred." (*Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 544.) "[W]e 'must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is . . . to be resolved in favor of the finding.' " (*Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 481, overruled in part on other grounds in *Scher v. Burke* (2017) 3 Cal.5th 136, 150, fn. 5.)

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[2] Defendants mistakenly believe plaintiff said the appropriate standard of review is abuse of discretion, concurring with that statement.

B

Plaintiff's Burden On Appeal

Plaintiff has the burden of proving the trial court abused its discretion. In carrying this burden, plaintiff must support each assertion with argument, legal authority, and citations to the record. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1207; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286-287; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.) We may and do "disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he[, she, or it] wants us to adopt." (*City of Santa Maria*, at p. 287.)

Further, "[f]ailure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179; accord *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153.) And, "[a]n appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such evidence is insufficient as a matter of law. [Citations.] An appellant who fails to cite and discuss the evidence supporting the judgment cannot demonstrate that such evidence is insufficient. The fact that there was substantial evidence in the record to support a contrary finding does not compel the conclusion that there was no substantial evidence to support the judgment." (*Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1408.)

C

Plaintiff's Challenges Fail

Under the headings, "there was sufficient use of [the road] by public [*sic*] for implied dedication" (bold and capitalization omitted) and "[t]he number of users was sufficient to establish implied dedication" (bold and capitalization omitted), plaintiff essentially raises nine arguments.

We do not consider or address the following three arguments because they are irrelevant to whether the trial court abused its discretion in finding insufficient public use of the road for implied common law dedication, the ruling challenged as set forth in the two headings: (1) the road was "not 'casual, haphazard, diverse and the passageways ill-defined' "; (2) the testimony by one of the defendants "show[ed] that as of the date of the trial, motorized use continued on [the road] and that the path all the way to Dobkins lake is well defined and that the Forest Service had taken no steps to stop motorized use of [the road] across Forest Service Land"; and (3) the trial court erred in finding the testimony indicated use of the road dated back to only the 1940's when witnesses testified to earlier use of the road by the public. Issues discussed in a brief but not clearly identified by a pertinent heading are deemed forfeited. (*Pizarro v. Reynoso, supra,* 10 Cal.App.5th at p. 179.)

Plaintiff also asserts the trial court erred in considering the testimony of only 17 of its 27 witnesses because almost all of the witnesses used the road prior to 1972 and "[t]he fact that some of them only used [the road] for less than five [years] still indicates that there was a general understanding that [the road] was a public road prior to 1972." Plaintiff fails to provide record citations identifying the testimony pertinent to the argument, does not discuss the relevant and specific portions of those witnesses' testimony, and provides no explanation how the 10 additional witnesses' testimony impacts our review of the trial court's finding. We thus conclude plaintiff forfeited the argument. (*City of Santa Maria v. Adam, supra,* 211 Cal.App.4th at p. 287 [we disregard conclusory arguments failing to disclose the reasoning by which appellant reaches the conclusion it wants us to adopt].)

Plaintiff further argues the trial testimony "demonstrated that the public's use of [the road] has been longstanding (over 100 years), extensive (used annually by hundreds of people) and without permission or objection. (See Statement of Facts.)" And, "[t]he testimony at trial, summarized in the Statement of Facts, clearly shows the public use of

[the road] was substantial for many decades prior to 1972, thus, plaintiff has established there was sufficient public use for dedication of [the road]." Plaintiff forfeited these arguments by failing to provide record citations to the pertinent testimony, and instead referring us generally to the statement of facts. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 & fn. 16.) Additionally, plaintiff fails to cite the testimony relied upon by the court and explain why such evidence is insufficient as a matter of law. (*Rayii v. Gatica, supra,* 218 Cal.App.4th at p. 1408.)

Plaintiff adds it disagrees with the trial court's finding "that the fact that [the road] was depicted on multiple maps and that [the road] was assigned a [United States Forest Service] road number does not mean the public had a right." Plaintiff posits, "[w]hy else would the forest service [*sic*] assign [the road] a number which was published on recorded public maps?" and "[w]hy would the State of California publish in 1967 the Angler's Guide describing access to Dobkins Lake and other lakes via [the road] and then have game wardens like Robert Gray hand out literally hundreds of these documents to the public?" Plaintiff provides no *argument,* however, as to how this information establishes sufficient public use of the road for implied common law dedication -- the finding challenged under the pertinent headings of its brief.

The trial court said, "[t]his court cannot and does not conclude that [the Forest Service road] designation creates a right to public access, nor does the mere existence of a Dale Creek Road on older maps create such a right." Plaintiff's disagreement with the trial court's decision aside, plaintiff does not explain why the trial court abused its discretion. Indeed, plaintiff cites no authority for the proposition that the identification or designation of a road on a map supports a finding of implied common law dedication nor are we aware of any such authority.

Plaintiff next asserts the trial court erred in finding three of its witnesses had express or implied permission to use the road and two witnesses knew the road was private but continued to use it. Plaintiff relies on the witnesses' testimony that they never

asked permission to use the road and believed the road was a public road. Plaintiff does not argue the trial court's findings were unsupported by the evidence; plaintiff instead appears to argue the trial court "mischaracterize[d] the testimony" because the court did not give the testimony cited by plaintiff greater weight. To the extent there is a substantial conflict in the testimony, however, the conflict is to be resolved in favor of the trial court's finding. (*Hanshaw v. Long Valley Road Assn.*, *supra*, 116 Cal.App.4th at p. 481.) Additionally, plaintiff fails to cite, acknowledge, or address the evidence supporting the trial court's findings, which is fatal to its argument. (*Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1408 [failure to cite and discuss evidence supporting the judgment cannot demonstrate that such evidence is insufficient].) For example, Day testified his family had permission to roam Hammond ranch because his dad worked there and Blankenship testified the Hammonds allowed him to enjoy their property and he considered the Hammonds to be like family. Such testimony supports the trial court's findings.

Plaintiff also takes issue with the trial court's discussion of the defendants' testimony regarding their observations of people using the road. Plaintiff asserts the "testimony should not have been considered in making a determination of public use prior to 1972" because none of the defendants were familiar with the road or the surrounding area prior to 1972. But, plaintiff fails to address the trial court's reason for considering the testimony; that is, "[i]t was undisputed that use of [the road] increased significantly after 1972" and "[y]et even with this increased use, the defendants who observed [the road] saw few or no users." In other words, if the greater level of use after 1972 was insufficient to put landowners on notice that the public was using the passage as if it had a right to do so, then the lesser level of use prior to 1972 was certainly also insufficient to establish implied common law dedication. Plaintiff does not address the trial court's reason for considering the defendants' testimony and thus cannot establish the court abused its discretion.

Finally, plaintiff's attempt to analogize the facts of this case to the facts in *Friends of the Trails* is unavailing. "When we decide issues of sufficiency of evidence [and abuse of discretion], comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) As this court explained in *Friends of the Trails*: "The problem of adversity in implied dedication is analogous to the question, in prescription cases, whether the use in issue should be characterized as prescriptive or attributed to neighborly accommodation. [Citation.] The fact patterns are myriad and the question often imbued with overtones of local norms, customs, and expectations. That is one reason why such cases, unless clearly outside the range of discretion, generally warrant deference to the local finder of fact." (*Friends of the Trails v. Blasius*, *supra*, 78 Cal.App.4th at p. 825.) Here, plaintiff has failed to show the court's finding of insufficient public use to establish implied common law dedication clearly falls outside the range of discretion.

Because plaintiff failed to prove the trial court abused its discretion in finding insufficient public use of the road to establish implied common law dedication, the conservation of judicial resources persuades us there is nothing to be gained by addressing the remainder of plaintiff's arguments.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Hoch, J.